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SRI MUDA CORNER HOLDINGS (M) SDN BHD v. IRDK LAND SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING JC
[ORIGINATING SUMMONS NO: BA-24NCVC-1603-11-2019]
18 MAY 2021

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LAND LAW: *Transfer – Memorandum of transfer – Transfer of property upon successful bid at auction – Whether bank empowered to execute Form 14A – Whether registered proprietor bare trustee of property upon payment of full purchase price – Whether registered proprietor proper party to execute Form 14A in favour of successful bidder – Whether existence of caveat on property prohibited registration of transfer*

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One Uthama Kumara Naidu ('assignor') entered into a sale and purchase agreement with the first defendant, a developer of a commercial development, to purchase a unit of a five-storey shop office at the agreed purchase price of RM4,288,888.88. The assignor obtained financing facilities of RM2,500,000 from the second defendant ('bank') to part-finance the purchase. At the time of granting the facility, the bank procured from the first defendant, an undertaking that, upon the issuance of a separate document of title, it would execute a valid and unstamped memorandum of transfer ('Form 14A') in favour of the bank as attorney of the assignor and would also deliver the document of title free from all encumbrances. As security for the facility, the assignor executed a deed of assignment over the property and a power of attorney in favour of the bank. The title was issued in the name of the first defendant. The assignor subsequently defaulted under the facility. The bank then took steps to realise its security under the facility and the deed of assignment by conducting various public auctions. The plaintiff was the successful bidder of the property. The plaintiff paid the requisite 10% deposit and executed a memorandum of sale with the bank. However, the plaintiff was not successful in its attempt to complete the transfer and purchase of the property and hence, commenced this action, *inter alia*, seeking the first defendant to sign and execute a valid Form 14A in favour of the plaintiff and deliver it to the plaintiff together with the individual document of title free from encumbrances. As against the bank, the plaintiff sought orders that: (i) the bank obtain from the first defendant, a valid and duly executed Form 14A in favour of the bank; (ii) alternatively, the bank, as the holder of the power of attorney, was to execute the Form 14A in favour of the plaintiff and cause the same to be served onto the bank (plaintiff) together with the individual document of title free from encumbrances. Additionally, the plaintiff also sought an order that the first defendant and the bank to provide an undertaking in favour of the plaintiff's financiers that they would execute a transfer of the property to the plaintiff within seven days from the financiers giving an undertaking that the balance purchase price would be paid by them.

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Held (allowing application in part):

(1) The plaintiff, in executing a written contract, was bound by its terms. Upon its successful bid at the auction, the plaintiff signed the memorandum of sale. The memorandum of sale incorporated terms in relation to the purchase of the said property and by executing it, the plaintiff agreed to be bound by the terms in the memorandum of sale. The plaintiff was made aware, even before bidding at the auction, that the job of procuring consent for the transfer from the first defendant lay with the plaintiff. Hence, the question of the bank obtaining consent from the first defendant did not arise. (paras 20, 21 & 24)

(2) The bank was not obliged to register its charge over the property after the issuance of the document of title. Therefore, the declarations sought against the bank were wholly without any legal or factual basis. Consequently, the order sought to compel the bank to obtain from the first defendant a valid and executed Form 14A in favour of the bank as the holder of the power of attorney was baseless. (paras 25 & 26)

(3) The power of attorney granted by the assignor to the bank was for a limited purpose, *ie*, to empower the bank, upon the issuance of document of title, to execute the Form 14A for the transfer of the property from the first defendant to the assignor, and thereafter to create a charge by the assignor to the bank as security. It did not extend to authorising the bank to execute the Form 14A on behalf of the first defendant to the plaintiff. Therefore, the alternative order sought was totally untenable. The bank was in no position to execute the Form 14A to transfer the property to the plaintiff as it was not the registered proprietor. (paras 28 & 29)

(4) The first defendant had received the full purchase price of the said property from the assignor. That being the case, it no longer had any right nor interest on the property, notwithstanding that it was the registered proprietor. It was merely a bare trustee of the property. Upon the issuance of the document of title, the first defendant was obliged to execute the Form 14A to the bank, but that was not done, despite having given an undertaking to this effect. The first defendant also could not refuse to transfer on the ground that there was a caveat on the land. The existence of the caveat was not a legal impediment to order the first defendant to execute the Form 14A. The caveat merely prohibits the registration of the transfer and other dealings. (paras 31, 33 & 34)

(5) In the circumstances, an order for the first defendant to execute the Form 14A would not conflict with the earlier undertaking given to the bank to execute in favour of the bank. This undertaking would now be superseded by the order of this court to execute Form 14A in favour of

A the plaintiff. The first defendant, as the registered proprietor of the property, was the proper party to execute the Form 14A. A direct transfer would be the most expedient way to complete the purchase of the said property by the plaintiff. (paras 35 & 36)

B **Case(s) referred to:**
He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA ***(refd)***

For the plaintiff - JJ Naidu; M/s JJ Naidu & Rakan-rakan
C *For the 1st defendant - Muhammad Farhan Shafee & Thilagan Mehanathan; M/s Shafee & Co*
For the 2nd defendant - Denise Teoh; M/s Shook Lin & Bok

Reported by S Barathi

D **JUDGMENT**

Alice Loke Yee Ching JC:

Introduction

E **[1]** The plaintiff's suit arose out of a public auction held on 27 April 2019. Notwithstanding its successful bid for a property sold at the public auction, it failed to proceed further with the necessary documentation to complete the transfer of the property. The consequent disputes with the defendants resulted in the filing of this originating summons on 13 November 2019 seeking various prayers.

F **The Salient Facts**

[2] The factual background giving rise to the plaintiff's claim herein are as follows.

G **[3]** The first defendant was the developer of a commercial development at Alam Avenue, Mukim Bukit Raja, District of Petaling, Selangor Darul Ehsan. On 29 July 2010, one Uthama Kumara Naidu a/l Sundara Rajoo ("the assignor") entered into a sale and purchase agreement with the first defendant to purchase a unit of five-storey shop offices identified as Unit A1-2 in Alam Avenue ("the said property"). The purchase price of the said
H property was agreed at RM4,288,888.88.

[4] The assignor then applied for financing facilities ("the facility") from the second defendant to part-finance the purchase of the said property. The loan amount granted was RM2,500,000. The purchase price for the said property has since been fully paid to the first defendant.

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[5] At the time of granting the facility, the individual title to the property had not been issued. However, the second defendant procured from the first defendant an undertaking that upon issuance of a separate document of title, it will execute a valid and unstamped memorandum of transfer ("Form 14A") in favour of the second defendant as attorney of the assignor and will also deliver the document of title to the said property free from all encumbrances. This undertaking was issued *vide* letter dated 6 September 2010.

[6] As security for the facility, on 30 September 2010, the assignor executed a deed of assignment over the said property and a power of attorney in favour of the second defendant. The individual title was only issued on 28 July 2011 after the grant of the facilities. The title was issued in the name of the first defendant.

[7] The assignor subsequently defaulted under the facility. The second defendant then took steps to realise its security under the facility and the deed of assignment by conducting various public auctions. On 27 April 2019, the plaintiff successfully bid for the said property at a reserve price of RM3,720,200 ("the LACA auction").

[8] At the LACA auction, the plaintiff paid the requisite 10% deposit of RM372,020. A memorandum of sale was executed with the second defendant on 27 April 2019. To enable it to pay the balance purchase price, the plaintiff applied for, and was granted financing by AmBank Bhd and Alliance Islamic Bank. The plaintiff then appointed the firm of Messrs YC Pang, Chong & Gordon to handle the documentation process to enable it to complete the purchase of the said property.

[9] On 11 June 2019, Messrs YC Pang, Chong & Gordon wrote to the first defendant to enquire *inter alia*, if the first defendant would agree to effect a direct transfer to the plaintiff as the successful bidder of the said property. The first defendant was also asked to confirm that the assignor was the beneficial owner of the said property. In addition, the plaintiff requested that a caveat lodged on the said property by Tan Sri Ramasamy a/l Muthusamy ("TS Ramasamy"), a director of the first defendant, be withdrawn within ten days.

[10] The first defendant responded *vide* its solicitors' letter of 27 August 2019 stating that it could not give the confirmation as requested nor would it agree to the removal of the caveat as TS Ramasamy had a financial interest in the said property pursuant to a power of attorney granted to it by the assignor. The alleged interest came about as a result of a personal loan of RM3,500,000 granted by the first defendant to the assignor, wherein the assignor had also executed an irrevocable power of attorney over the said property.

[11] Several letters ensued from the various solicitors appointed by the plaintiff to attempt to complete the transfer and purchase of the property, but failed. The second defendant has granted the plaintiff an extension of time to pay the balance purchase price on condition that late payment charges be made to the second defendant.

[12] The quandary the plaintiff now finds itself in has led to the filing of the originating summons. As against the first defendant, the plaintiff seeks the following prayers:

(i) the first defendant is to provide confirmation and/or undertaking as requested in the letter dated 11 June 2019 issued by Messrs YC Pang, Chong & Gordon within seven days of the order given by this court; and

(ii) the first defendant is to sign and execute a valid Form 14A in favour of the plaintiff and to deliver it to the plaintiff/its solicitors together with the individual document of title free from encumbrances.

[13] In respect of the second defendant, the plaintiff seeks the following prayers in the form of declarations:

(i) the second defendant had failed to obtain from the first defendant a consent to conduct the public auction on 27 April 2019;

(ii) the second defendant had failed to perfect the charge over the property prior to the auction held on 27 April 2019; notwithstanding the fact that the individual title to the property had been issued on 28 June 2011; and

(iii) the second defendant had failed to obtain from the first defendant a valid and executed Form 14A in favour of the second defendant (as the holder of the power of attorney).

[14] As a consequence thereof, the plaintiff seeks the following orders:

(i) the second defendant is to obtain from the first defendant a valid and duly executed Form 14A in favour of the second defendant;

(ii) alternatively, the second defendant as the holder of the power of attorney is to execute the Form 14A in favour of the plaintiff, and cause the same to be served onto the second defendant or its solicitors, together with the individual document of title free from encumbrances.

[15] In addition to the above prayers, the plaintiff has also sought an order common to both; the first and second defendants are to provide an undertaking in favour of the plaintiff's financiers, namely AmBank and Alliance Islamic Bank that they will execute a transfer of the property to the plaintiff within seven days from the financiers giving an undertaking that the balance purchase price will be paid by them.

Contentions Of The Parties

[16] The defendants' positions to resist the prayers sought for can be summarised thus. The first defendant contends as follows:

(i) the plaintiff has no legal relationship with the first defendant. The contractual relationship of the plaintiff is with the second defendant, as the party who successfully bid at the auction conducted by the second defendant. In other words, the plaintiff has no *locus* to bring an action against the first defendant;

(ii) there is an existing caveat on the property which is currently the subject matter of litigation in Shah Alam High Court Suit No: BA-24NCVC-1604-11-2019. The existence of the caveat renders it impossible on the part of the first defendant to execute a memorandum of transfer of the property from the first defendant to the plaintiff; and

(iii) the first defendant has an existing undertaking to execute a valid and unstamped Form 14A in favour of the second defendant upon issuance of the document of title. This obligation ought to be discharged first by the first defendant. The order sought against the first defendant to execute a direct transfer to the plaintiff conflicts with the existing undertaking.

[17] The second defendant on the other hand, opposes the prayers sought against it on the following grounds:

(i) the first defendant's consent is not required prior to the LACA auction as evidenced from the clear terms of the memorandum of sale;

(ii) there is no obligation on the second defendant to register its charge over the property despite the issuance of the document of title; and

(iii) the second defendant is not the proper party to execute Form 14A.

Analysis And Decision Of This Court

[18] I consider it more expedient to deal with the prayers sought against the second defendant first. Although the plaintiff's initial position was that this suit was primarily against the second defendant, it somewhat resiled from this stand when the second defendant supported the prayers sought against the first defendant. Nonetheless, for the sake of completeness, I will deal with the issues in contention between both these parties.

[19] The plaintiff complains that as it was in a position of unequal bargaining power, it had a right to be furnished with all the relevant particulars pertaining to the property, particularly with regard to the fact that individual title had not been issued at the time the facility was granted. Had the second defendant obtained the consent of the first defendant (as the

registered proprietor) prior to the auction, the plaintiff would not have found itself in this position. Having successfully bid at the public auction, it unable to complete the sale as the first defendant refuses to consent to the execution of the Form 14A.

[20] The plaintiff's complaint is without merit. Upon its successful bid at the auction, the plaintiff signed the memorandum of sale. The memorandum of sale incorporates terms in relation to the purchase of the said property. By executing it, the plaintiff had agreed to be bound the terms in the memorandum of sale. The pertinent clause to consider is cl. 8 which states:

> **Clause 8(a)**
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> The Property is sold subject to the Purchaser applying, at its own costs and expenses, for the approval or consent or confirmation (if any) required from the Developer and/or Proprietor and/or State Authorities and/or other relevant bodies (whether in Malaysia or the relevant foreign jurisdictions) to transfer or assign the Property in favour of the Purchaser within thirty (30) days or such extended period as allowed by the Assignee from the date of the successful sale, whereby the Purchaser shall forward a copy of the application letter for the said approval or consent or confirmation duly acknowledged receipt by the Developer and/or Proprietor and/or State Authorities and/or other relevant bodies to the Assignee's Solicitors and obtain the said approval or consent or confirmation on or before the Completion Date.

[21] It is trite law that the plaintiff in executing a written contract, is bound by its terms. In *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; [2010] 3 MLJ 425 the Court of Appeal held:

> [36] ... In *L'Estrange v. F Graucob, Ltd* [1934] 2 KB 394 at p. 403, Scrutton LJ aptly said and which would surely apply to the plaintiff:
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> > When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.
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> [37] Thus, a person who signs a contractual document is bound by its terms even though he has not read it. In *L'Estrange v. F Graucob Ltd*, the proprietress of a cafe bought an automatic cigarette vending machine. She signed, but did not read, a sales agreement which contained an exemption clause 'in regrettably small print'. It was held that she was bound by the clause, so that she could not rely on defects in the machine, either as a defence to a claim for part of the price, or as entitling her to damages.

[22] Clause 8 expressly negates any obligation on the part of the second defendant to obtain the necessary consent to transfer from the first defendant. The obligations rests with the plaintiff as the purchaser.

[23] Further, the proclamation of sale contains a clear notice and warning to the prospective bidders expressed in a note before setting out the particulars of the property, as follows:

> The Purchaser shall immediately upon the sale undertake to apply for and obtain the necessary confirmations/consent to transfer or assign (if any) from the Developer and/or Proprietor and/or State Authority and/or other relevant bodies (if required). If the separate issue document of title to the subject has been issued and registered in the name of the Developer and/or Proprietor, the Purchaser is responsible to effect transfer of the title of the subject property in the Purchaser's name.

[24] The plaintiff was made aware even before bidding at the auction, that the job of procuring consent for the transfer from the first defendant lies with the plaintiff. The question of the second defendant obtaining consent from the first defendant does not arise.

[25] The next question to consider is whether there is an obligation on the second defendant to register its charge over the property after the issuance of the document of title. I find that the second defendant is again, not obliged to do so. This is obvious from the following clause in the memorandum of sale:

> **Clause 7.5(a)**
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> If the separate document of title or strata for the Property has been issued whether before, on or after the date of the auction sale, the Assignee shall not be required to procure a transfer nor to register its charge as prescribed by the National Land Code 1965 ... in favour of the Purchaser from the Developer and/or proprietor ...

[26] For the foregoing reasons, the declarations sought for against the second defendant are wholly without any legal or factual basis. Consequently, the order sought to compel the second defendant to obtain from the first defendant a valid and executed Form 14A in favour of the second defendant (as the holder of the power of attorney) is also baseless. This would only cause unnecessary documentation to effect a transfer of the said property to the plaintiff.

[27] Finally, the plaintiff also seeks an order that the second defendant as the holder of the power of attorney granted by assignor, be ordered to execute the Form 14A in favour of the plaintiff. This prayer is sought for in the alternative, in the event the second defendant cannot be ordered to obtain an executed Form 14A from the first defendant.

[28] The power of attorney granted by the assignor was for a limited purpose. It was to empower the second defendant, upon the issuance of document of title, to execute the Form 14A for the transfer of the property from the first defendant to the assignor, and thereafter to create a charge by

A the assignor to the second defendant as security. It did not extend to authorising the second defendant to execute Form 14A on behalf of the first defendant to the plaintiff.

[29] Therefore, the alternative order sought for is totally untenable. The second defendant is in no position to execute the Form 14A to transfer the B property to the plaintiff, as it is not the registered proprietor. The first defendant is the registered proprietor.

[30] I shall now deal with the claim against the first defendant. As the plaintiff is not entitled to seek an order against the second defendant to execute the Form 14A, can the first defendant be compelled to do so instead? C I am of the view it can.

[31] The first defendant has received the full purchase price of the said property from the assignor. That being the case, it no longer has any right nor interest on the property, notwithstanding that it is the registered D proprietor. It is merely a bare trustee of the property.

[32] The Federal Court in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662 held:

> [47] ... In the case of *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614 (*Yeong Ah Chees* case) the then E Supreme Court had occasion to hold, *inter alia*, as follows:
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> > [1] It is an old and well settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a F lien on the land. When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser.
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> [56] We find the *Yeong Ah Chee* case is important for what was said by learned Justice Peh Swee Chin SCJ who wrote the apex court's judgment, G when he said:
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> > It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a H lien on the land. Please see *Lysaght v. Edwards* [1976] 2 Ch D 499 and this case was cited with approval very often in our courts eg by the Federal Court in *Intercontinental Miners Sdn Bhd v. Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v. Registrar of Titles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee i.e I qualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord

> Russel of Killowen in *Oh Hiam v. Tham Kong* [1980] 2 MLJ 159, PC that 'the Torrens System is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.

(See also *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 FC).

[33] Upon the issuance of the document of title, the first defendant was obliged to execute the Form 14A to the second defendant but that was not done. The first defendant had given an undertaking to this effect. Now that the property has been bought by the plaintiff at the LACA auction, it cannot now take advantage of the situation by contending that it has no nexus with the plaintiff and the latter cannot compel it to execute the Form 14A in its favour.

[34] The first defendant also cannot refuse to transfer on the ground that there is a caveat on the land. The existence of the caveat is not a legal impediment to order the first defendant to execute the Form 14A. The caveat merely prohibits the registration of the transfer and other dealings. The removal of the caveat is now the subject of litigation in another court. Nonetheless, the caveat cannot prohibit the grant of an order that the first defendant is to execute the Form 14A, even if the enforcement of it would depend on the successful outcome of the removal of the caveat.

[35] Contrary to the contention of the first defendant, an order for the first defendant to execute the Form 14A would not conflict with the earlier undertaking it had given to the second defendant to execute in favour of the second defendant. This undertaking would now be superseded by the order of this court to execute the Form 14A in favour of the plaintiff.

[36] The first defendant is the registered proprietor of the said property. It is the proper party to execute the Form 14A. There is no basis for it to refuse to do so. A direct transfer would be the most expedient way to complete the purchase of the said property by the plaintiff?

Conclusion

[37] For the foregoing reasons, all the prayers sought against the second defendant are dismissed with costs of RM3,000 to be paid by the plaintiff. In respect of the first defendant, prayer 6 of the originating summons is allowed. The first defendant is ordered to execute Form 14A in favour of the plaintiff and to deliver the document of title to the plaintiff's solicitors within 14 days of this order. The other orders are unnecessary. I also order that costs of RM3,000 be paid by the first defendant to the plaintiff.